

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
*See* Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

JUL 22 2011

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

|                        |   |                            |
|------------------------|---|----------------------------|
| THE STATE OF ARIZONA,  | ) | 2 CA-CR 2011-0039-PR       |
|                        | ) | DEPARTMENT B               |
| Respondent,            | ) |                            |
|                        | ) | <u>MEMORANDUM DECISION</u> |
| v.                     | ) | Not for Publication        |
|                        | ) | Rule 111, Rules of         |
| JOSE MIGUEL HARO-ARCE, | ) | the Supreme Court          |
|                        | ) |                            |
| Petitioner.            | ) |                            |
| _____                  | ) |                            |

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20074399

Honorable Deborah Bernini, Judge

REVIEW GRANTED IN PART, DENIED IN PART; RELIEF DENIED

West, Christoffel and Zickerman, P.L.L.C.  
By Anne Elsberry

Tucson  
Attorneys for Petitioner

ESPINOSA, Judge.

¶1 Petitioner Jose Haro-Arce seeks review of the trial court’s denial of his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. After a jury trial, Haro-Arce was convicted of one count of conducting a criminal enterprise; nine counts of sale or transfer of heroin, a narcotic drug, each exceeding the threshold amount of one gram; and two counts of possession of a narcotic drug for sale. He was sentenced to concurrent prison terms, the longest of which was life without the possibility of release for twenty-five years. We affirmed his conviction and sentences on appeal. *State v. Haro-Arce*, No. 2 CA-CR 2008-0385 (memorandum decision filed Sept. 24, 2009).

¶2 Haro-Arce also filed a notice of post-conviction relief.<sup>1</sup> After appointed counsel notified the trial court she could find “no issues for review” in the Rule 32 proceeding, Haro-Arce filed a pro se petition and reply in which he alleged his trial counsel had rendered ineffective assistance and he had been denied the right to testify in his own defense at trial. The trial court scheduled an evidentiary hearing on Haro-Arce’s claim he had been denied his right to testify and summarily denied his other claims. After considering testimony from Haro-Arce and his trial counsel, the court denied this claim as well, finding the “decision to not testify at trial was made after discussing the option with counsel” but was not forced by counsel. This petition for review, filed by Rule 32 counsel, followed.

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<sup>1</sup>Haro-Arce first filed a notice of post-conviction relief contemporaneously with his notice of appeal, and the trial court stayed the Rule 32 proceedings pending our review on appeal. He filed a second notice of post-conviction relief in November 2009. Like the court below, we regard this second notice as a motion to vacate the stay and commence Rule 32 proceedings, not a successive notice for post-conviction relief.

¶3 In it, counsel states Haro-Arce wishes to challenge the trial court’s denial of his claim that his attorney had rendered ineffective assistance when advising him of his right to testify. But counsel then informs us she has found no arguable, meritorious issues to raise on review and “[t]herefore, . . . believes it appropriate to file this brief pursuant to *Anders v. California*, 386 U.S. 738 (1967).” Citing *Anders*, she asks this court to search the record for fundamental error.

¶4 Absent a clear abuse of discretion, we will not disturb a trial court’s ruling on a petition for post-conviction relief. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). And, when the court has held an evidentiary hearing, we defer to the court’s factual findings unless they are clearly erroneous. *State v. Sasak*, 178 Ariz. 182, 186, 871 P.2d 729, 733 (App. 1993).

¶5 To the extent counsel suggests Haro-Arce seeks review of the trial court’s decision after the evidentiary hearing, we find no abuse of discretion. Substantial evidence at the hearing supported the court’s ruling. Trial counsel stated that, before trial, he had “an extensive discussion” with Haro-Arce about his constitutional right to testify—and the reasons he might not want to—and that Haro-Arce had decided he would not testify. Near the close of the state’s case, counsel had asked again about the decision, in the event Haro-Arce had “changed his mind” after hearing the evidence presented, but Haro-Arce “confirmed that he didn’t want to testify.” In his own testimony at the hearing, he acknowledged he had understood at trial that he was not obligated to testify, but that it was his right to do so, and also that it was his choice to make.

¶6 To the extent counsel suggests, without argument, that we review generally whether the trial court abused its discretion in denying Haro-Arce’s other claims, or that we review the record for fundamental error, we deny review. Contrary to counsel’s assertions, our review of a court’s denial of post-conviction relief is discretionary, and we have no “constitutional duty” to search the record for fundamental error. *State v. Smith*, 184 Ariz. 456, 460, 910 P.2d 1, 5 (1996).

¶7 For the foregoing reasons, review is granted in part and denied in part; relief is denied.

/s/ Philip G. Espinosa  
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Garye L. Vásquez  
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly  
VIRGINIA C. KELLY, Judge